Supreme Court, U.S.
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No. 02-1229

IN THE
SUPREME COURT OF THE UNITED STATES

STEVEN SIMON, ET AL.,
Petitioners,

v.

ELLIOT SCHWARTZ, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Daniel J. Popeo
Paul D. Kamenar
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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American Financial Printers (202) 464-5500

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QUESTIONS PRESENTED

1. Whether a district court, in awarding reasonable attorneys' fees in a statutory fee-shifting case, can circumvent this Court's prohibition against contingent risk enhancement (*see City of Burlington v. Dague*, 505 U.S. 557 (1992)) by awarding fees under common fund principles when the fee is paid by the defendant separately, not from the class's recovery.

2. If the answer to the first question is in the affirmative, whether *City of Burlington v. Dague,* prohibiting contingent risk enhancement in statutory fee-shifting cases, applies when a court awards reasonable attorneys' fees under common fund principles.

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INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF)[1] is a nonprofit public interest law and policy center based in

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel, contributed monetarily to the preparation and submission of this brief. Amicus is filing this brief with the consent of the parties. Letters of consent have been lodged with the Clerk of the Court.

Washington, D.C., with supporters across the nation. WLF regularly appears in legal proceedings before this Court and lower federal and state courts to defend the principles of free enterprise, limited government, and civil justice reform.

WLF devotes substantial resources in promoting fairness in judicial proceedings, and appears as amicus curiae in relevant cases involving the reasonableness of attorney fee awards and class action procedures. *See, e.g., Gisbrecht v. Barnhart*, 535 U.S. 789 (2002); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Farrar v. Hobby*, 506 U.S. 103 (1992); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (en banc).

WLF also represents objecting class members in class action cases opposing the award of excessive attorney's fees. *See, e.g., In re Synthroid Mkt. Litig.*, 264 F.3d 712 (7th Cir. 2001); *Wilson v. Massachusetts Mutual Life Ins. Co.*, No. D0101 CV 9802814 (1st Dist. Sante Fe County, NM) (objection filed Feb. 2, 2001); *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, MDL Docket No. 1361 (D. Me.) (objections filed March 3, 2003). WLF has also filed petitions with the Federal Trade Commission and the bar authorities in each of the 50 States urging closer regulation of the use of contingent fee agreements by plaintiff's attorneys.

In addition, WLF's Legal Studies Division also produces and distributes timely publications and studies on important legal topics, including class action and attorney's fees issues. *See,* James C. Martin, *Coming to Terms on Settlement Class Actions After*

Amchem *and* Ortiz, WLF WORKING PAPER (March 2000); Laura M. Franze, *Certification of Employment Discrimination Class Actions Under Civil Rights Act of 1991*, WLF CONTEMPORARY LEGAL NOTES (March 2000); Bert W. Rein & John E. Berry, *The Case for Abolishing Contingent Fee Arrangements*, WLF WORKING PAPER (Jan. 1999).

WLF believes that attorney fee awards in many class action cases are negotiated in ways that raise serious conflicts between the interests of class counsel and class members. This is particularly true where, as here, defendants agree to pay counsel's fee separately, giving the false impression that the amount allocated to the class for recovery has not been effectively reduced by these so-called "clear sailing" arrangements. Fee applications in these and other class action cases often receive little judicial scrutiny and result in the award of windfall attorney's fees to the detriment of class members.

WLF submits that the Ninth Circuit's decision in this case approving the award of fees in a class action brought under a fee-shifting statute on the basis of a percentage of the common fund -- rather than computing fees using the lodestar method -- clearly violates this Court's teachings in *City of Burlington v. Dague*. Under *Dague*, the lodestar method should be used in determining the reasonableness of fees under fee-shifting statutes, regardless of whether the case is a class action or not, and regardless of whether the case is settled or results in a favorable verdict after trial.

STATEMENT OF THE CASE

In the interests of judicial economy, amicus hereby adopts the Statement of the Case contained in the Petition.

In brief, this is class action lawsuit filed against Citibank, Universal Bank, and Universal Financial Corp., for failing to credit customers' credit card payments on the date of receipt, unless payment was received by 10:00 a.m. on that day. Because of this policy, class members claim they were charged excess finance charges and late fees in violation of the federal Truth In Lending Act (TILA), 15 U.S.C. §§ 1601, *et seq.*, and state law.

After the expiration of only 14 months from the time the litigation was commenced, and with relatively little law and motions practice, class counsel and the defendants reached a settlement agreement. The settlement provided that (1) the class members would share in a fund of $18 million; (2) limited injunctive relief would be imposed (valued by the court at $18 million); and (3) the defendants would separately pay up to $9 million in attorneys' fees to class counsel.

TILA provides that in cases where the plaintiffs are successful, the defendant is liable for "the costs of the action, together with a reasonable attorneys' fee as determined by the Court." 15 U.S.C. § 1640(a)(3).

The district court rejected the lodestar method of computing a reasonable fee award, and instead applied a percentage-of-recovery (POR) method. The district court awarded the plaintiffs 20% of the combined value of the cash fund and injunctive relief totalling $36 million,

thereby resulting in a fee of $7.2 million to be paid directly by the defendants.[2] Based upon the court's liberal assumption that 5,000 hours were expended in this case, the $7.2 million fee award translates into an effective hourly rate of $1,440 an hour. *See* Pet. App. 30. Assuming an hourly fee of $300 per hour, the amount awarded in this case that involved relatively little time and effort is approximately *five times* the lodestar rate. Notably, nowhere in the decision awarding this enhanced fee does the court refer to the complexity of the case, the risk of non-recovery, or the difficulty of retaining counsel at the lodestar rate.

On appeal by objecting class members, the Ninth Circuit upheld the award of fees, stating in pertinent part:

> [E]ven assuming that the settlement did not create a 'common fund' as a result of the agreement that class counsel's fees would be paid independently by Citibank and Universal, the district court was not required to apply the lodestar method to calculate class counsel's fees. See *Wing v. Asarco, Inc.* 114 F.3d 986, 990 (9th Cir. 1997).

Pet. App. 8. The Ninth Circuit thus all but ignored the applicability of *City of Burlington v. Dague*, concluding that the district court's preference for the POR method over the lodestar method was within its discretion.

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[2] If the $9 million allocated for attorneys' fees had originally been made part of the common fund, then the $1.2 million, representing the difference between the amount defendants agreed to pay in fees and the amount actually awarded, would have gone to the class members instead of reverting to the defendants.

REASONS FOR GRANTING THE PETITION

This case raises a recurring issue of exceptional importance involving the manner in which the courts annually award hundreds of millions of dollars in attorney's fees in class action cases, particularly in those cases where the underlying statute provides for the award of fees under a fee-shifting provision.

In a typical common fund class action case which does *not* involve a fee-shifting statute, the courts have determined the amount of attorney's fees by either using a percentage-of-recovery (POR) method, whereby the fee awarded is determined as a percentage from a common fund belonging to the entire class, or the lodestar method, whereby the fee is determined by multiplying the number of hours reasonably expended on the case times the reasonable hourly rate. Under either method, for every dollar that is not awarded to class counsel, that is one more dollar available for distribution to members of the class.

In other cases, class counsel and defendants agree to settle a case by simultaneously negotiating the amount to be awarded to the class, and a separate amount to be paid by the defendant to class counsel up to a predetermined maximum amount, subject to final approval by the court. Under this scheme, class counsel is less likely to be a strong advocate for recovering the maximum amount for the class since counsel essentially has been guaranteed his fee. Thus, while it may *appear* that the class will not have to pay their attorney any fees from the amount recovered for the class, the reality is that the amount allocated to the class has already been discounted by the

maximum amount of fees that the defendant has agreed to pay class counsel.

In *City of Burlington v. Dague,* 505 U.S. 557 (1992), this Court made it clear that in fee-shifting statutes, the amount to be awarded should be the lodestar amount rather than a percentage of the fund or a contigent risk enhancement. Consequently, this Petition raises the question of whether the lower courts and class counsel can ignore *Dague* in class action cases brought under a fee-shifting statute by simply settling those cases before trial.

As one commentator concluded, "In light of *Burlington* it seems difficult, if not impossible, to argue that a risk multiplier can now be used in settlement cases when the Court has rejected such a multiplier for cases that end with a trial." Stephen J. Safranek, *Curbing the Fees of the Class Action Lawyers in Light of* City of Burlington, 41 WAYNE L. REV. 1301 (1995) (hereinafter "Safranek").

This Petition also raises the alternative question that even if the separately negotiated fee agreement can be considered as part of the common fund, whether *Dague*'s lodestar method, as some lower courts have so indicated, should be applied in *all* common fund cases, regardless of whether the suit was brought under a fee-shifting statute.

While Petitioners's second question presented is contingent upon and interrelated with the first, amicus will focus generally on the overall issue of the applicability of *Dague* to this case.

REVIEW IS WARRANTED TO MAKE IT CLEAR THAT THE *CITY OF BURLINGTON V. DAGUE*'S LODESTAR METHOD OF AWARDING REASONABLE FEES WITHOUT CONTINGENT RISK ENHANCEMENT APPLIES TO THE SETTLEMENT OF CLASS ACTION CASES BROUGHT UNDER FEE-SHIFTING STATUTES

In *City of Burlington v. Dague*, this Court granted review of the following question:

> May a court, in determining a reasonable attorney's fee award under [a fee-shifting statute], enhance the fee award above the lodestar amount in order to reflect the fact that the attorneys had taken the case on a contingent-fee basis, thus assuming the risk of receiving no attorney's fees at all?

502 U.S. 1071 (1992). The Court subsequently answered this question unequivocally:

> [W]e hold that enhancement for contingency is not permitted under the fee-shifting statutes at issue. We reverse the Court of Appeals' judgment insofar as it affirmed the 25% enhancement of the lodestar.

City of Burlington v. Dague, 505 U.S. 557, 567 (1992).

This Court determined that the lodestar fee is presumptively a reasonable fee, and that any enhancement for contingency "would likely duplicate in substantial part factors already subsumed in the lodestar." *Id.* at 562.

The Court recently reaffirmed its preference for the lodestar method in *Gisbrecht v. Barnhart*, "[W]e again emphasize that the lodestar method was designed to govern imposition of fees on the losing party." 122 S.Ct. 1817, 1827 (2002).

In the case at bar, the class action lawsuit was filed under the Truth In Lending Act (TILA) which provides for an award of reasonable attorney's fees similar to the provisions of the federal environmental statutes at issue in *Dague*. If this case had gone to trial, and a verdict favorable to the plaintiffs were returned, *Dague* would control, and the fee awarded would be based on the lodestar.[3]

By turning a blind eye to *Dague* in fee-shifting cases that settle, and abdicating their duty under Rule 23 of the Federal Rules of Civil Procedure to ensure that the rights of absent class members are protected, the Ninth Circuit and other lower courts are encouraging class counsel to maximize their fees at the expense of the class by reaching quick settlements with favorable attorney's fee provisions

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[3] As previously noted, this case was brought under both TILA and state law, and thus is a blended case rather than one based solely on a fee-shifting statute. Nevertheless, that fact alone should not permit the lower courts to ignore altogether the teachings of *Dague*. It is quite easy for plaintiff's counsel to add a common law claim to a federal statutory claim, such as a general fraud claim in the case of a TILA claim, or a common law nuisance claim in a statutory environmental claim such as the one in *Dague*. At a minimum, amicus submits that the lower courts should determine if the statutory claim predominates, and if so, apply *Dague* for the entire case, or otherwise apply a blended fee. In any event, *Dague* should not be so easily disregarded.

far in excess of the reasonable lodestar. This widespread phenomenon has not gone unnoticed:

> The Supreme Court outlawed enhancements for contingency in statutory fee-shifting cases in *Burlington*. As a consequence unethical attorneys have already failed to argue for the application of *Burlington* to cases that settle and even to those that do not. This brazen promotion of self-interest over the interest of the class reveals that the central purpose of some class action settlements is to generate attorney fees.

Safranek, *supra*, at 1336.

The fees awarded in the instant case using the POR method are way out of line in comparison with the contingent enhancement struck down in *Dague*. In *Dague*, the lodestar enhancement that was struck down was 25%; here, the enhancement to the lodestar is approximately 400%, or *16 times* the enhancement in *Dague*.[4] Yet nothing in the opinions of the district court or court of appeals in this case suggested that there was any risk of nonrecovery. The parties reached a relatively quick settlement after suit was filed. There was no suggestion that the plaintiffs would have had any difficutly in obtaining competent counsel at the lodestar rate. The lower court opinions are also silent as to whether class

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[4] As previously noted, the effective hourly rate was at least $1,440 an hour. Thus, assuming a reasonable hourly rate of $300, the fee awarded is about five times the lodestar, or a 400% enhancement above the lodestar.

counsel had even entered into contingent-fee agreements with their clients, and if so, what the terms were.

As one commentator noted:

> In class action settlements in which statutory fees would be allowed to prevailing parties, the court has to approve a settlement allowing the attorneys to take from the common fund rather than to seek compensation from the defendants. If the court forces attorneys to seek their compensation from defendants, *Burlington* is clearly controlling and the lawyers will receive only statutory fees. If, however, the lawyers seek their compensation from the fund, it seems perverse to allow attorneys to receive a windfall by taking a percentage of the common fund when that percentage exceeds statutory fees.
>
> Whether the fees come from the defendants or from the fund should not change the amount of fees an attorney receives when a party sues under fee-shifting statutes. To hold otherwise would encourage attorneys and defendants to collude against the plaintiffs by settling cases. As the courts have recognized, a conflict of interest exists in common fund cases between the fund beneficiaries and the attorneys claiming fees from the fund. In these cases, the attorney's role shifts from that of an advocate to an adversary. Therefore, to minimize the conflict between the class and the class attorney, *Burlington* must be uniformly applied whenever fee statutes are involved.

Safranek, *supra*, at 1318-19 (footnotes omitted).

Amicus notes that not all courts have ignored this Court's teachings in *Dague* with respect to cases brought under fee-shifting statutes that are settled. For example, in *In re Bolar Pharmaceutical Co.*, 800 F. Supp. 1091 (E.D.N.Y. 1992), the parties settled a class action under the Securities Act of 1933 and RICO for $31 million. The attorneys sought fees from the common fund as a percentage of the amount recovered, even though the statutes in question provided for the award of fees.

The court rejected the attorney's fee request stating that "application of the *Burlington* rationale to equitable [common] fund cases does not defeat the purpose of the equitable fund doctrine. . . . That counsel will receive reasonable compensation for his work is ensured by the lodestar equation, which would not itself be affected by the elimination of a risk multiplier." *Id.* at 1096. The court based its decision on the fact that "in *Burlington*, the Supreme Court closed the door on risk multipliers in statutory fee cases." *Id.*

And as Petitioners note, a few courts have even applied the principles underlying *Dague* to a common fund case that did not even involve a fee-shifing statute. In *Nensel v. Peoples Heritage Financial Group*, 815 F. Supp. 26 (D. Me. 1993), for example, class attorneys sought a multiplier from a common fund generated in a settlement. The court rejected the contingent enhancement, holding that it saw "little, if any, basis to distinguish in the application of the holding in [*Dague*] between fee-shifting and common-fund cases." *Id.* at 28. The court agreed with the underlying rationale and concluded that the enhancement was not necessary because lawyers know that if they win, they will be

compensated out of the fund. *Id.* As a consequence, lawyers have enough incentive to pursue such cases because they have the certainty that they will be paid.

CONCLUSION

For the foregoing reasons, and those provided by the Petitioners, the Petition for Writ of Certiorari should be granted.

Respectfully submitted.

Daniel J. Popeo
Paul D. Kamenar
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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